An Eye for an Eye: Law as an Instrument of Revenge in Poland

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In contemporary societies, the law may serve different functions: a channel for public discourse, a tool for co-ordination, or indeed an instrument of coercion. In contemporary Poland, constitutional law has recently acquired a novel function – an instrument of revenge.

Those following Polish affairs will already have spotted a strange symmetry in the current constitutional crisis arising from the actions of the Polish ruling party, PiS. The saga revolving around the appointment of three anti-judges (Cioch, Morawski and Muszyński) to the Constitutional Tribunal (CT) in December 2015 offers a case in point.

For a year, the right of these three figures to sit on the CT was questioned not only by the majority of Polish constitutional lawyers, but challenged by its (now) former President, Andrzej Rzepliński. Immediately after Rzepliński's term of office ended, the three anti-judges were introduced to the CT panel by his replacement, the PiS-appointed Julia Przyłębska.

However, packing the court with their own judges was not sufficient for PiS: a month later their Minister of Justice Zbigniew Ziobro, acting as the Prosecutor General, filed a tit-for-tat motion questioning the right of three other judges (Rymar, Tuleja, and Zubik) to sit on the Court, in effect signaling: "You question our judges, we question yours".

Who can tell that the questioning of the three anti-judges' appointment was based on two CT verdicts from December 2015 and supported by the Venice Committee, while Ziobro's motion rests on a conjured procedural triviality? Certainly not the confused general public, who have consequently lost interest in this apparently abstruse legal dispute.

The tit-for-tat strategy has recently been redeployed by PiS and now jeopardizes the Supreme Court. As readers of this blog know, in January, the Warsaw Court of Appeal referred a substantial prejudicial question to the Polish Supreme Court. The gist of the question is whether the recent appointment of Julia Przyłębska as President of the CT was carried out properly (on the doubts concerning her appointment you can read here).

The response of fifty PiS MPs was to file a motion to the Constitutional Tribunal challenging the appointment of Małgorzata Gersdorf as President of the Supreme Court. Following PiS's symmetrical model, Przyłębska appointed herself as one of the judges on the panel which is to decide on the MPs' motion. Thus we have a situation in which the President of the Constitutional Tribunal will legally assess whether the President of the Supreme Court is empowered to legally assess the powers of the President of the Constitutional Tribunal. A vicious circle, in every sense of the term.

The authors of the motion questioning the legality of the appointment of Gersdorf went to great pains to make their case identical with that concerning the appointment of Przyłębska. However, the similarities between the two cases are purely superficial.

On the face of it, both cases entail a doubt as to whether the judges at the respective courts (the Constitutional Tribunal in the case of Przyłębska and the Supreme Court in the case of Gersdorf) should undertake an extra resolution after selecting candidates. That resolution is needed to formally present the candidates to the President of Poland, who appoints them.

Digging a little deeper, one sees that the two cases are fundamentally different. In the Supreme Court, the reason for not undertaking the extra resolution is simple: no requirement for this resolution exists in the Polish Constitution or statutes. Moreover, the practice of not undertaking the resolution is sanctioned by custom: no

such resolution was undertaken in the Supreme Court for the last fourteen years, and no conflict arose over it. The PiS MPs were the first to claim that the lack of a requirement for this resolution is unconstitutional. In Przyłębska's case, the relevant statute clearly requires the resolution. However, no further resolution was undertaken because the set of requirements for selecting the candidates and those for presenting them to the President of Poland differ.

Przyłębska was able to secure a sufficient number of votes to be selected as a candidate for the President of the CT. She was not able to do the same with the second resolution, that of being presented to the President of Poland. For fear of not being supported by the majority of judges in this resolution, she did not submit it to ballot.

Thus at the center of Gersdorf's case lies a formality with no real-world consequences, while at the center of Przyłębska's case is a crucial decision concerning the power of a parliamentary majority to interfere in the leadership of the constitutional court.

The potential ramifications of the motion attacking Gersdorf's appointment as President of the Supreme Court renders it a paragon of legal eccentricity. In the case that the legal basis for that appointment is found to be unconstitutional, the motion's authors urge the Constitutional Tribunal to render all actions performed on that legal basis null and void. It is not clear how far this demand goes: the actions undertaken by the Supreme Court under Gersdorf's presidency include the formal confirmation of the legality of the last presidential and parliamentary elections. Thus, if the motion is successful, Poland's de jure and de facto leaders (President Duda and MP Jarosław Kaczynski) may find the legality of their own appointments undermined.

Its legal merits aside, the primary purpose of the motion is to undermine Gersdorf's legitimacy before the Supreme Court decides on whether Przyłębska was appointed properly. The latter case merits the Supreme Court's consideration, and it is likely that it will question Przyłębska's appointment. With their Gersdorf motion, PiS is laying the ground for an effective political counterattack: they have engineered a useful symmetrical narrative from the precariousness of Przyłębska's position, making that of her counterpart at the Supreme Court equally so – at least in the eyes of the uninitiated. This narrative can be deployed when the expected Supreme Court decision inevitably triggers political turmoil and revives the fight for the independence of the Constitutional Tribunal.

The strategy of PiS is to send a clear message: whoever wishes to use their legal powers against the government can be sure the government will strike back. This message is not confined to the courts. Last week, the representatives of several local governments withdrew their motion from the Constitutional Tribunal two minutes before a hearing for which they had waited three years. The motion claimed that local governments are delegated tasks by the central government, but without being allocated the funds to fulfil them. The reason for withdrawing the motion was a last-minute change of the judicial panel which was to decide their case, with one of the anti-judges replacing a longer-standing, fully legitimate one. As the Tribunal refused to either exclude the anti-judge or to postpone the hearing, withdrawing the motion remained the only option (in order to leave the door open to have the case heard in the future by a fully legitimized panel). The very next day, PiS announced that a series of inspections would start in the local governments to check how they manage their business, indicating that if they lack money for delegated tasks, it must be their own fault.

The PiS strategy is typical for governments that instrumentalise the law to achieve their political ends. For them, the law ceases to be a reservoir of public values and serves instead as a stick with which to beat its political rivals. Not only is this eye-for-an-eye strategy myopic; what is worse is that it leads to a form of constitutional blindness whereby rights become unrecognizable, leaving in their stead the perception of threatening shapes.

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